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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

VS.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant a rehearing of its order of October 12, 1959, denying the petition for Writ of Certiorari U.S. , and that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in the above entitled case, as prayed for in the petition filed June 23, 1959, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. The Brief of the Respondent in Opposition to Petitioner's Petition for Writ of Certiorari urges only one single point which is erroneous and was not adequately urged by the petitioner in his Petition or his Reply Brief.

On page 23 of the Brief of Respondent in Opposition to Petition for Writ of Certiorari, we take the liberty to quote from the opposing Brief on page 23:

> "It is the sole theory of petitioner Crookham that he had the detachment of the retina when he had the burning sensation, like sweat in his eye, after loading the second load of ties. His doctors say that such a burning sensation or pain was not produced by the separation of retina, for pain-wise one does not know when the retina separates. Take this alleged incident out of the case and petitioner does not have the least conjecture when the detachment occurred. There is no competent evidence as to when the retina detached."

In this connection also is quoted from the opinion of the Supreme Court of Appeals of West Virginia that "the only direct evidence * * * pointing to * * * plaintiff's injuries is his own statement."

It is believed that the foregoing statements had much to do with the denial of the petition for writ of certiorari and that there are substantial grounds available to the petitioner not previously presented in argument and are here urged, or at best it can be said that the grounds here urged were not adequately presented to the Court in the original petition of June 23, 1959.

A review of the record not only indicated that the petitioners direct evidence sustains his petition that his injury was sustained by lifting cross ties but that there are other witnesses who corroborate this testimony. The statement by the petitioner that the "pain" or burning sensation, taken from the case, does not leave the petitioner with any conjecture when the detachment occurred is incorrect. The Record on page 55, is as follows:

"A. I started to lift a tie. I reached down got it. It was a heavy one, a real heavy tie; I lifted it up. It just felt like salt in my eye. It wasn't a sharp pain—just a kind of burning sensation. When Ed comes around we took some time. I took my gloves off and wiped my glasses.

Q. Did you ask permission to do this?

A. Mr. Sayre said, 'Ray, your eyes is awful red.' I said I felt pretty good though I wanted to wipe my eyes.

Q. What, if anything, did you notice with reference to your vision after you felt the burning sensation?

A. *It was just like it was blurred, like scum* on my eye." (underscoring ours).

After the blurring sensation, Crookham lined up fence posts, and his eye continued to water, and in attempting to set fence posts, a fellow employee, Mr. Hayes, instructed Crookham to sight fence posts and get them in line, but Crookham, after being told by the witness, Hayes, that the posts were "leaning way over", called the foreman, Whittington, and asked that he sight the posts for Crookham, and Crookham explained to the foreman that the reason why he could not sight the posts was because of the injury to his eye, which had previously and immediately occurred during the loading of the ties. (R. 56-57).

This blurring condition continued to exist through the following day and until Crookham, the petitioner was compelled to see a doctor. The blurring of vision is corroborated by the foreman, Whittington (R. 229-230):

"Q. Do you know whether or not he [Crookham] was sighting posts?

A. Yes, he told me he was.

Q. Did he ask you to help sight the post?

A. That is right.

Q. Did he tell you something was wrong with his eye?

A. He believed he had some dirt in his eye.

Q. Wanted you to look and see if some were straight?

A. That is right.

Q. And you lined the post up for him?

A. That is right."

The blurring of vision is also corroborated by the fellow-workman, Hayes (R. 155):

"'A. As well as I remember, Mr. Crookham came back to help me. I were already there and he came back from loading ties, in the evening. It was getting up half-way in the afternoon, something like that, maybe later, wasn't too long until quitting time. Me and Mr. Crookham told you, we took ties over for some posts. Some had been cut off around a foot and we took them over to a hole which had been dug in the fence line. We took them and put them in the holes in the fence line and he held the posts and maybe I told Mr. Crookham to see if the posts were in line with the line we were building the fence on and he made mention that he got something in his eye, or something to that effect, and asked somebody else to line the ties in the fence row because that he couldn't see to line them and he called Mr. Jülkert or Mr. Whittington and told them for one or the other of them to look at the line, for he couldn't see as good as he had been.

Q. To the best of your recollection that was the time that you were loading ties on Mr. Sayre's truck?

A. If I am not mistaken, it was on the same day."

Therefore, the statement in the Brief of the Respondent in Opposition to Petition for Writ of Certiorari is absolutely incorrect, as well as the decision on the point in question by the Supreme Court of Appeals of West Virginia.

2. There are substantial grounds available to the petitioner although not previously presented and there are other grounds of argument here urged which were not adequately presented to the Court in the original petition of June 23, 1959.

It is respectfully submitted with all deference to this Honorable Court that it did not consider all the facts on the questions of causation, nor did the petitioners adequately urge arguments which should be presented. It is believed that the law today as laid down by the Supreme Court of the United States, is the same as it was on the day the original petition was presented. Those cases in support of this petition have already been cited in the Brief, the Petition and the Reply Brief of the Petitioner. It is also urged that the findings of the Trial Court, both during the trial of the case and on a special hearing set before the Trial Court and argued at length on a motion by the respondent for a new trial, were not sufficiently urged in the petitioner's Petition and Brief. It is believed that the Supreme Court of Appeals of West Virginia took out of context the medical doctor's statement that "no pain" would be occasioned at the moment the retina of Crookham's eye became detached, and did not take into consideration all the medical testimony.

The Supreme Court of West Virginia was of the opinion that the injury might have occurred at another time. There is ample evidence that injury to the Petitioner occurred and did occur while he was engaged in lifting railroad ties. Dr. Pensmidt, the treating physician, as well as Dr. Humphries, gave testimony that the trauma sustained by Crookham while lifting cross ties was the competent producing cause of the detached retina. This testimony in all respects is in line with introduction of evidence and was not a mere inference of opinion but left the question to the province of the jury of whether or not the specific trauma was competent to produce that particular injury. It is to be noted in the testimony of Dr. Pensmidt (the same can be said of Dr. Humphries testimony also) that he found the tissues of both eyes normal and of the same nature, degenerated only in consistency with Crookham's age. The first inquiry as to whether the trauma was competent to inflict some harm which would affect the course of the underlying process in the organs involved was most important. Something must be added or taken away from what existed before. Medically the jury found the lifting of the ties affected the then existing physiological structure involved in the disability, the detachment of the retina then, was not coincidental and was causally connected with the disability. Crookham suffered from nothing but the normal degeneration consistent with his age. All of the medical testimony concerning the lifting of the cross ties was that the same was the competent producing cause of the detachment of Crookham's retina. The weight of the evidence was left to the jury. That was the disability before the Court. The jury decided on the medical evidence before it, that lifting of the cross ties was the competent producing cause of the detachment of Crookham's retina. (R. 95-

116; 236-253). In effect, Crookham was saying, through his doctor, to the jury, "This is what I was. Look at me as I am now. Whatever was underlying in me was dormant, the defendant's action caused the injury. It was quiet and you brought it to life. By what right did you destroy the balance of nature and health at my age and plunge me into the misery of my disability." We believe the Court ignored the question of the precipitating factor in its decision and invaded the province of the jury which invasion is contrary to the established rule in West Virginia.

Bowen v. *Huntington*, 35 W. Va. 682.
Barker v. *Ohio River R.R. Co.*, 51 W. Va. 423."

3. The question continues to be one of large practical importance in the administration of the Federal Employers Liability Act with reference to injuries to railroad workers throughout the entire country involving far more substantial sums of money than involved in the instant case. The denial of certiorari now stands not only in the State of West Virginia, but in all jurisdictions on the Federal Employers Liability Act, that a State Court can substitute its own judgment for that of a jury where both a special and general verdict were given by the jury to an injured employee in a case where negligence obviously exists. The reported West Virginia decision being now a reported case as reported in 107 S. E. 2d 516; and by having certiorari denied by the Supreme Court of the United States of America approves and now places on record trial only by appellate court, thus abrogating the function and purpose of a jury trial and trial judge which are so vitally important to the preservation of liberty and justice to not only those covered by the Federal Employers Liability Act but also each individual

citizen in this country in that the decision overrules the findings of fact by the jury and trial court.

Mr. Justice Douglas states that "The right to trial by jury is a basic and a fundamental feature of our system of federal jurisprudence and part and parcel of the remedy afforded railroad workers, and that to deprive workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress afforded them."

The decision of the West Virginia Supreme Court of Appeals places a premium upon injuries to elder railroad employees and leaves all the law decided by the Supreme Court of the United States in such state of chaos that certiorari should be considered in this case. The sum of money involved although small here, is not controlling, there are many cases in the Federal District Courts and Courts of Appeal, and perhaps in this very Court that involve the same question here presented but involve much larger sums of money.

If the decision of the Supreme Court of Appeals of West Virginia in this case is permitted to stand it will strike terror into the hearts and lives of all injured railroad employees in West Virginia. Chaos and confusion as to what the law is in this state under FELA will be the inevitable result. That opinion is strikingly contrary to the case of *Pritt* v. *W. Va. Northern R. Co.*, 132 W. Va. 184, 51 S. E. 2d 105 (FELA case). It was in conformity to the opinion in the *Pritt* case, that the case at Bar was prepared and tried. It was thought that the rule of the *Pritt* case was the rule of this state as *this* Court denied certiorari. 336 U. S. 961. 93 L. Ed. 1113.

The *Pritt* case holds that if the question of fact is such that "different men might reach different conclusions,"

the jury verdict should not be disturbed. In this case the judges of the Supreme Court of Appeals of West Virginia did differ with both a jury of twelve men and an eminent trial jugde. Thus, "different men" did reach "different conclusions". Had there been a verdict for the Respondent in the Trial Court, and had the trial judge entered judgment on the verdict, then there would have been no difference of opinion. But here, there being a verdict for the Petitioner based on a "difference of opinion" the rule in the *Pritt* case was complied with and the jury's verdict should not be disturbed. The long and distinguished record of this Court will not permit a state to conflictingly construe a Federal Statute, to the everlasting destruction of those who toil by the sweat of their brow. There can be no question about the facts of this case meeting the test of "different men might reach different conclusions". Twelve jurors—twelve officers of the trial Court—found liability due to negligence. A trial judge—out of the experience of thirty years f continuous law practice—affirmed that jury, in both a special and a general verdict. Men in this case have differed. We have met the test of the *Pritt* case, which presumably was sanctioned by this Court. Now we ask at your hands, that the yardstick of that case be used here—used in the interest of an old, broken down, tired employee, an employee who gave thirty years of his life to the Respondent. This Court and his God are now his only hope. May his trust be well placed and his prayers answered.

The only possible difference between the *Pritt* case and this case is that in the former, an order was given while in the latter there was a failure to give any order. One is a wrong of commission, the other is a wrong of omission. Is there any substantial difference in the two? There is just as much duty to act to *prevent* injury as

there is to act to bring it about. The jury accepted this theory of the case, and since men have differed about the whole matter, the jury verdict should not be disturbed.

4. It is also urged that, based on procedure of the State of West Virginia, if certiorari is denied in this case, it shall go back to the Circuit Court of Mason County, West Virginia, to be re-tried and may again find its way to this Court. While sentiment has no place in matters before this Honorable Court, it is nevertheless, urged that such expense for the ordinary railroad working man deprives him of those rights which are guaranteed by our Constitution because of his impecuniary position, a position that is common to a majority of the people who are forced to labor with their hands, and particularly to that group of aged railroad employees who must and do work at the age of 60 under the constant fear of insecurity, due to aging conditions of their bodies and the possible disaster of losing their jobs because of their increased age and worse yet, because of injury without compensation due to their financial inability to assert their rights in the courts because of their impecunious position.

5. We believe there is error in the conclusion that there was a complete absence of any evidence of negligence in this case. Attention here is directed to the fact that nowhere did Petitioner by his own testimony foreclose any inference of lack or absence of negligence; to the contrary, there was ample evidence adduced to sustain the evidence of negligence and to justify the jury in finding a verdict for the plaintiff.

It is also believed that the Supreme Court of the United States of America should not elect to affect a change in the decisions heretofore rendered by it on the Federal Employers Liability Act by letting stand the decision of the West Virginia Supreme Court of Appeals.

CONCLUSION

For the reasons set forth above and in the petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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Dated: Nov 3, 1959

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

E. Franklin Pauley
Counsel for Petitioner